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No. 80-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
Petitioner,
v.
LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

MOTION:

Interest of the AFL-CIO and the Issues to Be Covered in the AFL-CIO's Brief Amicus Curiae.. iii

Conclusion v

BRIEF:

Argument 1

I. Under California v. Taylor, 353 U.S. 553, The Rights and Obligations of Employers Engaged in Common Carriage By Rail in Interstate Commerce and Their Employees Are Governed by the Railway Labor Act, Which Regulates and Protects the Right to Bargain Collectively 1

II. If a Balancing Test Is to Be Applied, the Federal Interests as Implemented in the Railway Labor Act Are Entitled to Prevail.. 7

III. The Constitutional Principle Declared In National League of Cities v. Usery, 426 U.S. 833, Does Not Support the Broad Scope of Its Limitation on the Commerce Power..... 15

Conclusion 18

TABLE OF AUTHORITIES

Cases: Page

Bus Employees v. Missouri, 374 U.S. 74 11
California v. Taylor, 353 U.S. 553 ..... *passim*
Coyle v. Oklahoma, 221 U.S. 559 17
Fry v. United States, 421 U.S. 542 ..... 8, 16
Hodel v. Virginia Surface Mining and Reclamation Association, —— U.S. ——, 49 L.W. 4654 (June 15, 1981) 6-7, 8
Labor Board v. Insurance Agents, 361 U.S. 477 12
Labor Board v. Jones & Laughlin, 301 U.S. 1 14
Lane County v. Oregon, 7 Wall. 71 16
Locomotive Engineers v. B. & O. R. Co., 372 U.S. 284 4
Maryland v. Wirtz, 392 U.S. 183 15
Metcalf & Eddy v. Mitchell, 269 U.S. 514 16
National League of Cities v. Usery, 426 U.S. 833 ..... *passim*
New York v. United States, 326 U.S. 572 15-16
Railroad Trainmen v. Terminal Co., 394 U.S. 369 .. 4, 10, 11, 12
Railway Clerks v. Florida E.C.R. Co., 384 U.S. 238 .. 4
Second Employers Liability Cases, 223 U.S. 1 13-14
SIRTOA v. International Bhd. of Electrical Workers, 57 A.D. 2d 614, 393, N.Y.S.2d 773 (2d Dept.), *cert. denied*, 434 U.S. 934 9-10
Texas v. White, 7 Wall. 700 15
U.S. v. Barnett, 376 U.S. 681 5
Virginian Ry. v. Federation, 300 U.S. 515 14

Statutes:

National Labor Relations Act, 29 U.S.C. §§ 141, *et seq.* 11
Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ..... *passim*

Miscellaneous:

Michelman, States Rights and States Rules: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 Yale L.J. 1165 6

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in this case.

INTEREST OF THE AFL-CIO AND THE ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 102 national and international unions with a total membership of 14,500,000 working men and women. The resolution of the question presented in this case concerning the scope of the rule

announced in *National League of Cities v. Usery*, 426 U.S. 833, will determine whether or not the members of the following affiliates of the AFL-CIO will continue to enjoy the right to bargain collectively protected by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*: the American Train Dispatchers Association; Brotherhood of Railway Carmen of the United States and Canda; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers' International Association. The Federation and those affiliates representing employees under the RLA therefore have a major interest in the outcome.

The attached brief *amicus curiae* is devoted to showing: first, that the issue in this case is controlled not by the new rule of federalism stated in *National League*, as the court below ruled, but by the long-settled rule upholding application of the RLA to State-owned railroads stated by a unanimous Court in *California v. Taylor*, 353 U.S. 553, and expressly reaffirmed in *National League*, 426 U.S. at 854, n. 18; and, second, that if this case is to be decided on a balancing test, as the court below supposed, the federal interest is entitled to prevail. Finally, we venture beyond the confines of this case and of the settled law to show that the *National League* Court's Constitutional premise does not support its conclusion that employment relations in the range of services the States have traditionally offered their citizens are beyond the reach of the Commerce Power.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

I. Under California v. Taylor, 353 U.S. 553, The Rights and Obligations of Employers Engaged In Common Carriage By Rail In Interstate Commerce and Their Employees Are Governed by the Railway Labor Act, Which Regulates and Protects the Right to Bargain Collectively.

The Court of Appeals proceeded on the premise that the present case is governed by precedent in this Court.

In this, the Court of Appeals was right, but that court followed the wrong precedent. For the issue in this case is controlled not by the new rule of law stated in *National League of Cities v. Usery*, 426 U.S. 833, as the court below ruled, but by the long-settled rule stated by a unanimous Court in *California v. Taylor*, 353 U.S. 553, and expressly reaffirmed in *National League*, 426 U.S. at 854, n. 18.

A. *California v. Taylor* squarely holds that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, applies to State-owned railroads and governs their relationship with their employees, notwithstanding contrary state laws (353 U.S. at 557-567); *Taylor* also expressly rejects California's submission "that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a State-owned railroad engaged in interstate commerce," (*id.* at 568).

In determining that State-owned railroads are covered by the RLA, the Court emphasized Congress' judgment that railroad labor relations are singular and should be regulated through the carefully balanced system Congress has devised:

> The Railway Labor Act is essentially an instrument of industry-wide government. See *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 749, 751 (dissenting opinion). The railroad world for which the Act was designed has been described as "a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, The National Railroad Adjustment Board; A Unique Administrative Agency, 46 Yale L.J. 567, 568-569 (1937). [353 U.S. at 565-566.]

The Court stressed the importance of uniformity in the Congressional scheme for railroad labor relations:

> The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. * * * Bargaining collectively * * * has often taken on a national flavor and agreements are uniformly negotiated for an entire railroad system. "[B]reakdowns in collective bargaining will typically affect a region or the entire nation." Lecht, Experience under Railway Labor Legislation (1955), 4. * * * Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force. [353 U.S. at 566-567, footnote omitted.]

And, the Court noted:

> [California's] civil service relationship is the antithesis of that established by collective bargained contracts throughout the railroad industry. "[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra,* at 347. If the Federal Act applies to the Belt Railroad, then the policy of the State must give way. [353 U.S. at 560.]

So, too, New York State's Taylor law is the "antithesis" of the scheme of collective bargaining established by the RLA. For, the RLA creates special procedures for the negotiation of, and the mediation of disputes over, the

terms of collective agreements covering rates of pay, rules, and working conditions. And the RCA provides further that if these elaborate and deliberately drawn-out procedures fail to result in agreement, the parties are legally entitled to resort to the use of economic weapons, *viz.* the strike and lock-out. (See particularly, *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284, 291; *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 244; *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 380-381, 384-386, 392-393.)

B. The Court in *California v. Taylor* concluded by meeting and rejecting the State's constitutional claim:

> In *United States v. California*, *supra*, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297 U.S. at 184. "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . . ." *Id.*, at 185. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. See also, *California v. United States*, 320 U.S. at 577, 586; cf. *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 233-238 [353 U.S. at 568.]

C. The continuing validity of the constitutional holding just set out was expressly confirmed in *National League*, 426 U.S. at 854, n. 18:

> The holding of *United States v. California*, • • • is quite consistent with our holding today. There California's activity to which the congressional com-

mand was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . ." 297 U.S., at 182.

For the same reasons, despite Mr. Justice Brennan's claims to the contrary, the holdings in *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), and *California v. Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today.

D. The Court of Appeals simply ignored that portion of *National League's* footnote 18 which denies that the holding of *California v. Taylor* is impaired.

That court did quote the first paragraph of that footnote, but dismissed it as "dictum." (634 F.2d at 26.) We suggest that the occasion must be rare indeed in which a lower court is free to disregard outright any portion of an opinion of this Court.[1] In any event, the Court of Appeals' "dictum" characterization is plainly incorrect. In the footnote in question the *National League* majority specifically addressed and rejected an objection raised by the dissenting opinion and deliberately stated the limits of its holding. Specifically, the Court made clear that the operation of railroads is outside the scope of "integral" governmental functions protected by the federalism principle declared in *National League*, thereby distinguishing those operations from those activities

[1] Such an approach might be proper where this Court itself describes a portion of its opinion as *"dictum"* (*See U.S. v. Barnett*, 376 U.S. 681, 695 n. 12 (continued)) or in some other manner indicates that while an issue is discussed its ultimate resolution is reserved. There may also be cases in which it is patent that part of the Court's opinion goes well beyond providing an authoritative answer to the questions presented. But, as we develop in the text, the Court of Appeals' treatment of *National League's* footnote 18 cannot be justified on either of these grounds.

which are so protected and from those whose status was left undecided.

Paradoxically the Court of Appeals chose to rely upon the *dissenting* opinion in *National League*. (634 F.2d at 26). Plainly, if Mr. Justice Brennan's reasoning in his *National League* dissent had prevailed it would be crystal clear that the RLA governs on the LIRR. And, as we have explained, the Court's opinion in *National League* expressly disavowed Justice Brennan's "claim" that the holding in *California v. Taylor* had been "impaired." The court below also noted that commentators "have questioned the rationale of excluding railroads from the protective core of governmental functions." (634 F.2d at 26). The single article cited in this connection declares: "Analyzed to the bottom, the [*National League*] decision proves insupportable except as it depends on a perception that 'states as states' under the Constitution are imbued with affirmative duties towards their citizens." (Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J., 1165, 1194.) At the outset Professor Michelman confesses that this interpretation of the decision "is a surprising one that leads in directions the Justices do not seem to have intended or anticipated." (*Id.* at 1166.) It is indefensible, we submit, for the court below to have taken as its guide to the meaning of *National League* not what was said in this Court's opinion, but a rejected portion of the dissenting opinion and one academician's effort to remake *National League* in his own ideological image.

E. It is sufficient for present purposes that the very decision on which the Court of Appeals based its conclusion disavowed any intent to disturb the constitutional holding of *California v. Taylor*. But, that court's rationale is further undermined by this Court's recent gloss on *National League* in *Hodel v. Virginia Surface Mining*

and Reclamation Association, —— U.S. ——, 49 L.W. 4654 (June 15, 1981):

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.* at 854. Second, the federal regulations must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852. [49 L.W. at 4660].

The very point of *National League's* footnote 18 (which we quoted *supra* pp. 5-6) is that "common carriage by rail in interstate commerce" is *not* an "integral part of * * * governmental activity" and therefore does not meet the Second and Third of the *National League* requirements as explicated in *Virginia Surface Mining*.

In short, since *California v. Taylor* squarely holds that the RLA may constitutionally be applied to state-owned railroads, and thereby preempt contrary State laws, and since *National League* expressly preserves *Taylor* as a viable precedent, the court below was in error in holding that the RLA must give way to New York State's Taylor law.

II. If a Balancing Test is to be Applied, the Federal Interests as Implemented in the Railway Labor Act Are Entitled to Prevail.

A. The Court of Appeals applied a balancing test to determine whether the rights of the parties to this case should be governed by the federal Railway Labor Act or by New York State's Taylor law, and opined that the balance was in favor of the latter. (634 F.2d at 29-30.) However, *Virginia Surface Mining* makes clear that only

after it has been determined that the three threshold requirements of *National League* are met (see *supra* p. 7, quoting 49 L.W. at 4660), is there an occasion for balancing. As the *Virginia Surface Mining* Court stated in a footnote immediately after it spelled out those three requirements:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See *Fry v. United States*, 421 U.S. 542, reaffirmed in *National League of Cities v. Usery*, *supra*, at 852-853. See also *id.*, at 856, (Blackmun, J., concurring). [49 L.W. at 4660, n.29.]

We have shown in Part I, that under the authority of *California v. Taylor*, and footnote 18 of *National League*, respondents cannot satisfy either the second or the third of the *National League* requirements. That showing is, we believe, dispositive. Nonetheless, we show next, as a separate and independent ground for reversal, that here, as in *Fry*, *supra*, the federal interest "justifies State submission." The Court of Appeals erred at each step of its "balancing" analysis.

B. The Court of Appeals sought to minimize the conflict between the RLA and the Taylor law by observing that both have the same object: that court quoted from the RLA and from *California v. Taylor* (353 U.S. at 566) to establish the undeniable proposition that a primary purpose of the RLA is to avoid the interruption of interstate commerce; and stated that the "Taylor law's prohibition against strikes seeks to further that purpose, thereby helping the LIRR to maintain its status as a 'vital link' in the flow of interstate commerce." (634 F.2d at 19.) But this very argument was rejected by this Court in the very passage from which the Court

of Appeals quoted but a phrase. In *California v. Taylor*, the Court said:

> Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is "To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 48 Stat. 1186 (§ 2), 45 U.S.C. § 151a. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 242. Like the Safety Appliance Act, the Railway Labor Act is "all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U.S. 175, 186. *The fact that, under state law, the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's "reign of law" was established.* A terminal railroad facility like the Belt Railroad is a vital link in the national transportation system. Its continuous operation is important to the national flow of commerce. [353 U.S. at 566; emphasis supplied.]

The court below also sought to distinguish the California statute, which *California v. Taylor* held to be the "antithesis" of the federal scheme (353 U.S. 559-560), from New York's Taylor law on the ground that "the state law involved here preserves the right of independent collective bargaining in several respects." (634 F.2d at 29.)[2] But like the California law, that of New York

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[2] The Court did not identify the respects in which collective bargaining is preserved by the Taylor law, but merely cited *SIRTOA v. International Bhd. of Electrical Workers*, 57 A.D.2d 614, 393

deprives the parties of the right to resort to economic weapons which Congress rightfully deems to be essential to collective bargaining over the terms of collective agreements between carriers on the one hand and their employees and unions on the other. As this Court noted in *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369:

> Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolu-

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N.Y.S.2d 773, 775-76 (2d Dept.), *cert. denied*, 434 U.S. 934, which, while making the same point (57 A.D.2d at 616) likewise did not identify the aspects of collective bargaining which New York state law permits. But we need not pursue that point, since the state law undeniably prohibits the most essential element of collective bargaining as established by the RLA—a carefully developed scheme of negotiation and mediation from which both parties know that if these measures fail, either party is free to engage in economic self-help.

It bears mentioning, however, that the Appellate Division in *SIRTOA* acknowledged that the "operation of a railroad in interstate commerce is *not* an integral part of state governmental activities which are protected from congressional impairment by principles of state sovereignty." (Id. at 615, citing *National League*'s footnote 18). The basis of that court's decision was that the "connection between *SIRTOA* and interstate commerce is extremely tenuous". According to the Appellate Division that railroad is "not a vital link in the national transportation system, the continued operation of which is important to the national flow of commerce; and the instant labor dispute does not present problems of national or even regional magnitude, which problems would require uniform treatment on a national scale," (*id.* at 616). (But see *Brotherhood of Locomotive Engineers v. SIRTOA*, 100 LRRM 3154 (E.D.N.Y., 1979); *Brotherhood of Locomotive Engineers v. SIRTOA*, 360 I.C.C. 464 (1979).) In contrast, in this case, the court below appears to have acknowledged that the LIRR is a "vital link in the flow of interstate commerce." (634 F.2d at 29, quoted above).

> tion of particular controversies, no such general provisions have ever been enacted. [394 U.S. at 379-80, footnotes omitted]

Accordingly, "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help." (*Id.* at 381, emphasis in original; see also *id.* at 384-385 and 392).

In sum, under the Railway Labor Act, as under the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*, "collective bargaining, with the right to strike at its core, is the essence of the federal scheme" (*Bus Employees v. Missouri*, 374 U.S. 74, 82). Preservation of that right is not inconsistent with, but promotes the Congressional objective of avoiding interruptions of interstate commerce, an objective common to both the RLA and the NLRA. It should be sufficient that Congress has so determined in its major legislation governing the relationship between labor and management. But it may be useful to recall that this Court has articulated the theory underlying what may on the surface be a paradox —that industrial peace is furthered by establishing a system in which the potential of self-help by the parties underlies their negotiations. In *Railroad Trainmen*, Justice Harlan wrote:

> We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary

to continue operating in the face of a strike. [394 U.S. at 380-381][3]

B. The court below determined that New York's interest in the regulation of the LIRR was greater than that of the federal government because 80 percent of the LIRR's revenue comes from its passenger operations and 20 percent from its carriage of freight. But this reasoning is entirely too simplistic.

To begin with, it is not clear why, if financial impact is at all relevant in determining the federal Government's interest, the LIRR's gross revenues should be the measure, rather than, for example, net revenues. And the lower court appears to have overlooked the fact that some of its passengers are using the LIRR as part of an interstate journey, to be continued on other carriers by other carriers, rail, air, or motor.

More fundamentally, the lower court's line of argument gives no weight to the point that the LIRR is part of a *single nationwide rail system* and that a central federal interest is the *uniform* regulation of that system, as this Court has repeatedly recognized. (See, for example, *California v. Taylor*, 353 U.S. at 567 (quoted *supra*, p. 3), and *Railroad Trainmen*, 394 U.S. at 380-381.) Removing the LIRR from the aegis of the RLA would itself undermine that uniformity, and the rationale of the decision below would also justify other exclusions and thereby transform the overall national scheme into a patchwork quilt of regulations.

C. In concluding its balancing discussion the court below said:

> In sum, we recognize that the LIRR would come under the literal terms of RLA, see *California v. Taylor, supra*, and that the right to strike, free from state interference, has been held essential to

[3] The same theory is more fully explained in *Labor Board v. Insurance Agents*, 361 U.S. 477, 489-490.

that federal scheme, *Bhd. of R. R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382-82, 89 S. Ct. 1109, 1115-1117, 22 L.Ed.2d 344 (1969). (634 F.2d at 30).

In fact, these considerations were not given the weight of a feather. Indeed, the court below quoted, as if it were conclusive, that portion of *National League* which declares its basic constitutional holding that the commerce power may not be exercised "so as to force directly upon the States [Congress'] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." (634 F.2d at 30, quoting from 426 U.S. at 854-855). But that holding is not a part of the balancing process. Rather, as *Virginia Surface Mining* makes clear (see *supra* pp. 7-8), a determination that an integral governmental function is involved is a necessary but *not* a sufficient predicate for invalidating the choices made by Congress in the exercise of its commerce power. In other words, while the passage from *National League* quoted by the Court of Appeals is a critical portion of this Court's opinion, it is preliminary to, and is neither a part of, nor a substitute for, the balancing process which the Court of Appeals undertook. To put the States' sovereign interests into the scale at this later point of analysis is to misread *National League*. And it is to inevitably reach a result in favor of the State and against Congress because no weight is afforded to the interests of the national sovereign.

The lower court's felt necessity to ignore the national interest is readily understood. For that interest is at its zenith when it comes to the regulation of interstate transportation—and specifically, to relationships between carriers in commerce and their employees. And that overriding national interest requires that the balance be struck in favor of Congressional supremacy. As Justice Van Devanter wrote for a unanimous court in the *Second Employers' Liability Cases*, 223 U.S. 1:

Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act. [223 U.S. at 48.][4]

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[4] See also, *e.g.*, *Virginian Ry. v. Federation*, 300 U.S. 515, 553-557, where the Court sustained the constitutionality under the Commerce Clause of § 2 of the RLA, in a unanimous decision rendered just two weeks before the Court divided five to four over whether the Wagner Act was a valid exercise of the Commerce Power. Compare *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 29-32 with *id.* at 76-78.

III. The Constitutional Principle Declared In National League of Cities v. Usery, 426 U.S. 833, Does Not Support the Broad Scope of Its Limitation on the Commerce Power.

For each of the reasons just stated in Parts I and II, the judgment below must be reversed as inconsistent with the law stated in *National League* and in *Virginia Surface Mining*. And, while it is not of present moment, it is, we believe, appropriate in a brief *amicus curiae* to conclude by addressing what, with all due deference, is a major void between the *National League* Court's constitutional premise on the one hand, and the list of state functions to which the Court stated the FLSA may not be constitutionally applied—"fire prevention, police protection, sanitation, public health, and parks and recreation" (426 U.S. at 851) and "schools and hospitals" (*id.* at 855)—on the other. We do so lest, without further consideration, this latter part of the *National League* decision be reiterated and thus take on added force.

The Constitutional principle *National League* declares is "that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." (426 U.S. 842.) Those limits, said the Court, were marked out in earlier formulation such as the following: "The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States," (*Texas v. White*, 7 Wall. 700, 725 quoted at 426 U.S. at 844); and "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (*Fry*, 421 U.S. at 547 n. 7 quoted at 426 U.S. at 843. See also *id.* at 842-844 quoting *Maryland v. Wirtz*, 392 U.S. 183, 196; *New*

York v. United States, 326 U.S. 572, 587-588; *Lane County v. Oregon*, 7 Wall. 71, 76; and *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523.) Then the Court provided the following explanation of why its premise required the invalidation of the FLSA amendments at issue:

> [T]he [FLSA] amendments * * * will * * * significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. * * * [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. * * * We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, 8, cl. 3. [426 U.S. at 851-852.]

The precursors of *National League* noted by the Court there speak in carefully circumscribed terms: the "indestructible States" are not equated to separate sovereigns but are properly placed within an "indestructible Union." The pre-*National League* cases recognize that the nature of that Union and of the national sovereign bears inevitably on the nature of the States as "sovereignties." For, so far as is relevant here, that Union, formed in the Constitution, grants the Federal Government plenary power to regulate commerce and makes such regulations supreme. In contrast, *National League's* rationale does

not so much as mention the Union. The States are stated to be "sovereign governments" with a "freedom to structure integral operations in areas of traditional governmental functions," and the functions listed extend to the provision of such public services as "parks and recreation."

We have no doubt that there are powerful arguments for the proposition that a government that does not provide public parks, public recreation or public hospitals does not fulfill the requirements of a "good state" in the platonic sense of that term. Indeed, the list of public service areas in *National League* is the agenda for proper governmental action of the social reformers of the last hundred years.

But so far as the *National League* Court shows, or we are aware, there is nothing in the Constitution providing that the States must follow that agenda, that in order to foster that agenda the States are freed from otherwise applicable Federal requirements, or that large scale enterprises such as a public park, a public recreation area or a public hospital, the operation of which *in fact* affects commerce in the same fashion as a private park, a private recreation area, or a private hospital is to be deemed to be outside the Commerce power.

In short, there is no inevitable progression from the recognition that there are powers which "are essentially and peculiarly state powers" whose exercise the Federal Government may not impair—such as the power to "locate its own seat of government" and to "appropriate its own public funds for that purpose" (*Coyle v. Oklahoma*, 221 U.S. 559, 565, quoted in *National League*, 426 U.S. at 845)—to the proposition that the wide range of *proper* public services which the States have traditionally offered are part of the States' "freedom" as "sovereign governments".

This case is not, as we noted at the outset, the occasion to draw up the list of such "essentially and peculiarly

state powers." It is sufficient, we believe, to note that few, if any, services provided both by the public and private sector could find a place, and that the running of railroads that operate in interstate commerce is plainly not included as even *National League* recognizes.[8]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[8] This is not to say that the provision of police or fire protection is not such a state power, even though in an attenuated sense there are private counterparts. For the role of the private policeman (guard) is different in kind from that of the public law enforcement officer; the former are charged with protection of the safety of the property and sometimes personnel of their employer, whereas the latter are charged with protecting the entire public. There is no such difference between a publicly-owned stadium and a private one or between a publicly-owned hospital and a private one.